

**II. REMARKS**

In the Office Action mailed on September 16, 2005 in U.S. Application Serial No. 10/840,003 (the "'003 Application"), the Examiner indicates that Applicant's benefit claim to prior filed non-provisional application, U.S. Application Serial No. 09/482,277 (the "'277 Application") was improper. The Examiner states that the '277 Application became abandoned as of February 9, 2004. Since the '003 Application was filed on May 6, 2004, the required "co-pendency" was lacking.

Applicant respectfully submits that this is not correct because Applicant explicitly authorized the payment of any required fees, including extension fees, during the entire pendency of the '277 Application to Deposit Account 16-1350 (the "Deposit Account"). As such, the extension fee required in the '277 Application, to maintain pendency with the filing of the '003 Application, was authorized to be and should have been charged to the Deposit Account. Thus, the '277 Application was properly "pending" as of the date of filing the '003 Application.

A summary of the facts and evidence supporting this request is as follows:

1. The New Application Transmittal in the '277 Application included an "Authorization to Charge Additional Fees" (see Section 15, page 9-11). A copy of the New Application transmittal in the '277 Application is attached hereto as Exhibit A).
2. The New Application Transmittal in the '277 Application includes the following statements:

"The Commissioner is hereby authorized to charge the following additional fees by this paper and during the entire pendency of this application to Account No. 16-1350:

37 C.F.R. §1.17(a)(1)-(5) (extension fees pursuant to §1.36(a))."

3. In the '277 Application, a Final Office Action was mailed on November 6, 2003 (Paper No. 8). A three-month statutory response period was set with the response due on February 6, 2004.

4. On May 6, 2004 Applicant filed a Continuation Application of the '277 Application, which resulted in the '003 Application. A copy of the '003 Application transmittal is attached hereto as Exhibit B. The '003 Application transmittal papers state, on page 1 of 4, that the '003 Application is a "Continuation of prior application No.: 09/482,277".

5. The transmittal papers for the '003 Application authorize the Director to charge any additional filing fees required under 37 C.F.R. 1.16 and 1.17 to Deposit Account 16-1350 (see page 4 of 4). The National Application filing, search and examination fee are covered under 37 C.F.R. §1.16. Patent application processing fees are addressed by 37 C.F.R. §1.17 and **extension fees** under §1.136(a) are expressly covered by 37 C.F.R. §1.17(a).

6. A Preliminary Amendment accompanied the continuation application filing papers in the '003 Application. The preliminary amendment states in the Specification Amendments section, that this "application is a continuation of and claims priority from U.S. Patent Application No. 09/482,277 filed on January 13, 2000". (see page 2 of Preliminary Amendment).

7. The Continuation Application of the '277 Application was assigned U.S. Serial No. 10/840,003 with a filing date of May 6, 2004.

8. A Notice of Abandonment in the '277 Application was mailed on July 1, 2004. (A copy is attached hereto as Exhibit C). The Notice of Abandonment does not indicate the effective date of the abandonment.

Applicant respectfully submits that the extension fees required to maintain the pendency of the '277 Application was authorized to be charged to the Deposit Account, and should have been so paid. The statement that the Commissioner is hereby authorized to charge the following additional fees by this paper and during the entire pendency of this application to Account No. 16-1350 suffices to authorize the payment of the required extension fees. Such a statement is explicitly recognized as incorporating a petition for extension of time (see 37 C.F.R. §1.136 (a)(3)). Extension of Time fees can be paid by an authorization to charge all required fees under 37 C.F.R. §1.17, such an authorization will be considered a constructive petition for extension of time. (See 37. C.F.R. §1.136(a)(3)(A). The rules do not require the filing of a written petition. Thus, the required extension fees were authorized to be paid and should have been charged to the Deposit Account.

It is also submitted that the charging of the three-month extension in the '277 Application was authorized by the statement in the '003 Application Transmittal that permitted "additional filing fees" under 37 C.F.R. §1.17 to be charged to the Deposit Account. It is submitted that since the petition for extension of time and payment of the extension fee were a necessary

prerequisite to the proper filing of a continuation application of the '277 Application, the required fees were authorized and should have been charged to the Deposit Account. It is very clear that a proper claim for priority in a continuation application requires copendency. (35 U.S.C. §120). Applicant expressly recited that the '003 Application filing was a continuation of, and claimed priority from the '277 Application. Thus, the '277 Application necessarily was required to be pending as of the filing date of the Continuation Application. Since 37 C.F.R. §1.17 expressly covers extension of time fees, and such fees were authorized to be charged to the Deposit Account, it necessarily and logically follows that the required extension of time fee, as a necessary prerequisite, should have been charged to the Deposit Account.

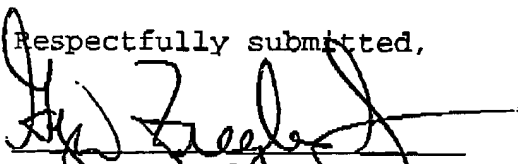
Thus, it is submitted that the authorizations in both the '277 Application Transmittal and the '003 Application Transmittal expressly authorized the payment of the required extension fees, and acted as a petition for extension of time, to maintain the pendency of the '277 Application, after the expiration of the three-month statutory response period to the Office Action mailed November 6, 2003.

Therefore, it is respectfully submitted that the '277 Application was properly pending as of the filing date of the '003 Application and Applicant's claim for priority is proper and valid.

Reconsideration is therefore respectfully solicited.

The Commissioner is hereby authorized to charge payment for any fees associated with this communication or credit any over payment to Deposit Account No. 16-1350.

Respectfully submitted,

  
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Reg. No. 44,004

11 OCTOBER 2005  
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#### CERTIFICATE OF FACSIMILE

I hereby certify that this correspondence is being transmitted by facsimile to (571) 273-8300 on the date indicated below.

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Person Making Deposit